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No. 80-1832

In the Supreme Court of the United States

OCTOBER TERM, 1980

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE APPELLANT

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SUPPLEMENTAL MEMORANDUM FOR THE APPELLANT

Pursuant to Rule 16.6 of the Rules of this Court, the appellant Immigration and Naturalization Service files this supplemental memorandum to call the Court's attention to the recent decision of the United States Court of Appeals for the Third Circuit in *Dastmalchi* v. *INS*, Nos. 80-2432, 80-2440, and 80-2441 (Sept. 17, 1981).[1] In *Dastmalchi*, the Third Circuit held that it did not have jurisdiction on a petition for review of an order of deportation under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a), to consider constitutional challenges by three Iranian aliens to an INS regulation[2] and various practices

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[1]This supplemental memorandum may also be of relevance to the Court's consideration of the petitions for a writ of certiorari filed by the House of Representatives and the Senate in Nos. 80-2170 and 80-2171.

[2]The validity of the regulation, promulgated at the outset of the Iranian hostage crisis to require all nonimmigrant Iranian students to report to an INS district office, was sustained in *Narenji* v. *Civiletti*, 617 F. 2d 745 (D.C. Cir. 1979), cert. denied, 446 U.S. 975 (1980).

by the INS District Director that allegedly resulted in their deportation. In reaching this conclusion, the Third Circuit expressed its disagreement (slip op. 15-22) with the Ninth Circuit's holding in the instant case (J.S. App. 4a-11a) that it had jurisdiction on a petition for review under Section 106(a) to rule on appellee Chadha's contention that the one-House veto provision in Section 244(c)(2) of the Act, 8 U.S.C. 1254(c)(2), is unconstitutional.

The premise for the Third Circuit's conclusion was that the court of appeals' jurisdiction under Section 106(a) is limited to matters decided in the administrative deportation proceedings; the court therefore reasoned that because the immigration judge and Board of Immigration Appeals do not consider constitutional challenges to the Immigration and Nationality Act and implementing regulations, the court of appeals cannot consider such challenges either. Slip op. 13, 17-18, 19-20. In the present case, in contrast, the Ninth Circuit considered appellee Chadha's constitutional challenge to the one-House veto provision in Section 244(c)(2) of the Act even though the immigration judge and the Board of Immigration Appeals had concluded that they had no authority to pass on the constitutionality of an Act of Congress. J.S. App. 71a, 73a.

Contrary to the Third Circuit's decision, we believe the Ninth Circuit correctly concluded that the immigration judge's and Board of Immigration Appeals' holding that they could not entertain appellee Chadha's constitutional claim at the administrative level did not, in itself, bar the court from considering that challenge on a petition for review. See, *e.g.*, *Weinberger* v. *Salfi*, 422 U.S. 749, 762-764 (1975). Moreover, we think it clear that appellee Chadha's constitutional challenge was within the scope of the jurisdiction of the court of appeals under Section 106(a) of

the Act. He "directly challeng[ed]"[3] the final order of deportation. In addition, determinations with respect to suspension of deportation historically have been made "as an integral part of the proceedings which have led to the issuance of a final deportation order" (*Foti* v. *INS*, 375 U.S. 217, 223 (1963)). Such was the case here: the immigration judge, *in the course of deportation proceedings*, suspended appellee Chadha's deportation while the matter was reported to Congress (J.S. App. 66a), and the immigration judge gave effect to the House's resolution of disapproval by reopening those same proceedings and entering an order of deportation. Thus, appellee Chadha plainly challenged a "determination[] made during a [deportation] proceeding conducted under § 242(b) [of the Act]" (*Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 216 (1968)). The court of appeals therefore had jurisdiction to consider the matter on appellee Chadha's petition for review. *Ibid.*; *Foti* v. *INS*, *supra*. See 2 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 8.9Ab at 8-76 to 8-82 (rev. ed. 1981); *id.* at 8-74 ("[r]eview by the Court of Appeals under [Section 106(a)] includes consideration of any constitutional challenges which would void the deportation order").

We are currently reviewing the Third Circuit's decision in *Dastmalchi* to determine whether a petition for rehearing or motion for modification of the opinion should be filed in that case.[4] Despite the reasoning of that decision, it is not clear that its actual *holding* necessarily is inconsistent with

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[3]See *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 215 (1968).

[4]The INS has requested an extension of time within which to file a rehearing petition. Although the government argued in *Dastmalchi* that the court of appeals was without jurisdiction to entertain the aliens' challenge to the INS regulation, it did not urge the broad rationale adopted by that court. Nor did the INS in *Dastmalchi* question the jurisdictional holding by the Ninth Circuit in this case. Therefore, the Third Circuit developed its analysis without the assistance of the parties.

the jurisdictional holding of the Ninth Circuit in the present case. Unlike appellee Chadha, whose claim was integrally related to the deportation proceedings, the aliens in *Dastmalchi* challenged an INS regulation that required them to report to the District Director *before* deportation proceedings were initiated. The District Director's alleged denial of discretionary relief and refusal to reinstate the aliens in *Dastmalchi* to student status likewise either preceded or were independent of the Director's issuance of the show cause orders and therefore also were not part of the deportation proceedings. Compare *Cheng Fan Kwok* v. *INS*, *supra*.

If the Court notes probable jurisdiction of the appeal in this case, it can address the question of the court of appeals' statutory jurisdiction if that question appears worthy of review, for the appeal brings up the "whole case." *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975).

For the foregoing reasons and the reasons stated in the jurisdictional statement and reply brief, probable jurisdiction should be noted.

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